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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BARRON KEITH SIMMONS, Defendant and Appellant.	D052815 (Super. Ct. No. SCD204931)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed.

A jury convicted Barron Keith Simmons of multiple offenses arising from acts of domestic violence and related events. Simmons appeals contending the trial court erred in instructing the jury on uncharged acts of domestic violence with jury instruction CALCRIM No. 852. We will reject his contentions and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

In this appeal, Simmons does not challenge either the admissibility or the sufficiency of any of the evidence supporting his convictions. Further, the specific

contentions raised on appeal do not require consideration of any of the facts of the charged or uncharged offenses in order to fully consider the issues raised by Simmons. Accordingly, we will not discuss the evidence in this case even though the parties' briefs contain very lengthy discussions of the facts. It is sufficient to simply note that the convictions arise from numerous acts of violence, and threats to the victims in this case and to a previous victim. The offenses also include those which involved flight from police and threats to witnesses.

Simmons was convicted of one count of corporal injury to a spouse or roommate (Pen. Code,[1] § 273.5, subd. (a)); two counts of dissuading a witness by force or threats (§ 136.1, subd. (c)(1)); one count of making a criminal threat (§ 422); one count of felony false imprisonment (§§ 236/237, subd. (a)); one count of evasion of a police officer while driving in willful disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)); and one count of violation of a protective order (§ 166, subd. (c)(1)). Simmons admitted two prison priors within the meaning of section 667.5, subdivision (b); one serious felony prior conviction within the meaning of section 667, subdivision (a)(1), and one prior strike conviction within the meaning of section 667, subdivisions (b) through (i).

Simmons was sentenced to a total determinate term of 22 years, 4 months. Simmons has filed a timely notice of appeal.

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1 All further statutory references are to the Penal Code unless otherwise specified.

DISCUSSION

This appeal raises two challenges to the jury instruction, CALCRIM No. 852, as given by the trial court. First, Simmons contends the instruction as given was erroneous because it permitted the jury to consider uncharged acts of domestic violence in deciding the charge of dissuading a witness (§ 136.1, subd. (c)(1)) as contained in count 7. He contends dissuading a witness is not an act of domestic violence and therefore evidence admitted under Evidence Code section 1109 is not relevant to such charges. The second challenge to the instruction is based on the contention that the instruction violated due process because it potentially reduced the prosecution's burden of proof.

We will reject the first contention because the acts of dissuading witnesses in this case involve threats, which could place a person in "reasonable apprehension of imminent serious bodily injury to himself or herself, or another" (§ 13700, subd. (a)). We will reject the second contention because our Supreme Court and the Courts of Appeal have already addressed the same arguments and squarely rejected them.

A. Witness Dissuasion as "Domestic Violence."

Evidence of uncharged acts of domestic violence was admitted at trial under the provisions of Evidence Code section 1109.[2] The court instructed the jury regarding the use of such evidence with jury instruction CALCRIM No. 852. In that instruction the

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[2] Evidence Code section 1109, subdivision (a)(1) provides in part: "Except as provided . . . , in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

court told the jury it could consider such evidence with regard to all of the counts in the information with the exception of the Vehicle Code violation, which did not involve any form of domestic violence.

Simmons contends, for the first time on appeal, that the instruction should not have included count 7 alleging dissuading a witness, which occurred after Simmons was arrested and placed in jail. The threats in this count were made the day before the scheduled preliminary hearing.

The Attorney General responds first that the issue should be deemed forfeited because no request for modification of the instruction was made in the trial court, and second, that the facts as proved in count 7 qualify as domestic violence. We agree with the Attorney General on the merits of this issue and decline to address the claim of forfeiture.[3]

Turning to the merit of the argument, as we have noted the threats in count 7 occurred on April 16, 2007, the day before the scheduled preliminary hearing when Simmons called the victim from jail. In that recorded conversation Simmons said: "I'm looking at years. I'll kill you bitch. . . . I'm gonna murder you and your mama, if I got to do those years." Simmons continued: "And don't get your ass on the stand nor your mama. Do you understand that?"

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[3] The argument for forfeiture is premised on the characterization of defense counsel's actions in the trial court as failing to request a limiting instruction. We do not find that to be an apt characterization on this record since the trial court affirmatively instructed the jury the evidence could be considered with regard to count 7. This case more likely falls within the principle expressed in *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140.

Apparently the specific call was only one of over 200 calls Simmons made to the victim between April 16 and 17. Both the victim and her mother failed to appear for the preliminary hearing although they had both been subpoenaed.

At trial the victim downplayed the threat. She said she and her mother failed to appear at the preliminary hearing because she had transportation problems. When defense counsel suggested that she was not afraid as a result of the threats, the victim said: "He was in jail. What was he going to act upon?" From the victim's statements at trial, Simmons reasons the threats do not involve domestic violence because the victim was not afraid.

Evidence Code section 1109, subdivision (d)(3), defines the term "domestic violence" by reference to section 13700. As relevant to this issue, section 13700, subdivision (a), defines abuse as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another."

In *People v. Rucker* (2005) 126 Cal.App.4th 1107, 1112-1113, this court addressed the question of whether an act may constitute domestic violence. In that case Rucker visited an ex-boyfriend who she had been harassing. When she arrived at his door she pointed a gun at him and said: "Please let me in. You know I know how to use this." The former boyfriend let her into his house and then calmed Rucker down. He persuaded her to give him the gun, which he kept in his possession until she left, at which time he gave the gun back to her. The former boyfriend said he was not afraid at the time

because she gave him the gun. Upon reflection, however, he became afraid and realized he should have called the police. (*Id.* at p. 1118.)

This court concluded in *Rucker, supra,* 126 Cal.App.4th 1107, that the action of the defendant did constitute domestic violence as defined in Evidence Code section 1109 and section 13700.

Simmons seeks to distinguish this case from *Rucker, supra,* 126 Cal.App.4th 1107, on the basis that Rucker was present at the house and had the present ability to harm the victim. Whereas, in this case Simmons was in jail and did not have immediate access to the victim. The evidence is clear that immediately following the threats and hundreds of phone calls the victim and her mother failed to appear in court. Certainly a reasonable juror could conclude that the victim was not only in fear, but reasonably in fear based on Simmons's direct and persistent threats. The jury could, and did reasonably conclude that Simmons scared both the victim and her mother to the point they elected not to attend court.

We are satisfied that on this record the actions of Simmons in dissuading the victim from testifying were in the nature of domestic violence and thus the other act evidence could legitimately be considered by the jury in regard to count 7.

B. CALCRIM 852 Does Not Reduce the Prosecution's Burden of Proof.

In his final challenge to the other acts instruction, Simmons contends the pattern instruction violates his due process rights because it allows the jury to infer guilt from the propensity evidence and it reduces the burden of proof. These arguments have been previously addressed by the courts and rejected. We again reject these contentions.

CALCRIM No. 852 is similar to CALJIC No. 2.50.02, which also deals with the manner in which juries can consider evidence of uncharged acts. In *People v. Reliford* (2003) 29 Cal.4th 1007, 1016, the court rejected virtually the same challenges as raised here. Following the direction of *Reliford,* the Third District Court of Appeal in *People v. Reyes* (2008) 160 Cal.App.4th 246, 250-253, reached the same conclusions regarding CALCRIM No. 852. The court in *Reyes* specifically rejected the two contentions raised here. The same court again rejected these contentions in *People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740.

Simmons argues his challenge is somehow different from that raised in *People v. Reliford, supra,* 29 Cal.4th 1007, although that opinion finds no due process violation in the similar language of the CALJIC instruction. Simmons simply argues *People v. Reyes, supra,* 160 Cal.App.4th 246, was wrongly decided and that *People v. Johnson, supra,* 164 Cal.App.4th 731, did not contain any analysis additional to *Reyes.* We disagree with Simmons and conclude the issues he now raises have been rejected by both the Supreme Court and the Court of Appeal. We agree with the reasoning in *Reyes* and *Johnson* and, of course, we follow the directions of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We find the trial court did not deny Simmons his right to due process by instructing the jury with CALCRIM No. 852.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.